

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

DEC 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Telephone Company-Cable Television) CC Docket No. 87-266
Cross-Ownership Rules, Sections)
63.54 - 63.58)
)
and)
)
Amendments of Parts 32, 36, 61, 64,) RM-8221
and 69 of the Commission's Rules to)
Establish and Implement Regulatory)
Procedures for Video Dialtone Service)

**COMMENTS OF AMERITECH ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING**

In the Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking,¹ the Federal Communications Commission ("FCC" or "Commission") sought comment on several issues related to implementation of video dialtone. Ameritech² hereby submits these comments on the issues raised by the Commission.

I. THE FCC SHOULD NOT MANDATE ALL DIGITAL VIDEO DIALTONE SYSTEMS

The FCC should maintain its current position that it will not dictate technology decisions for video dialtone.³ The proper stance is for the FCC to allow

¹ In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266 and RM-8221 (released November 7, 1994) ("Reconsideration Order").

² Ameritech means: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

³ In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking (released August 14, 1992) ("Video Dialtone Order") ¶¶ 13, 45.

market factors to determine how quickly video dialtone networks migrate to all-digital systems. More importantly, the Commission should not mandate the delivery platform of the non-dominant provider of video services. An appropriate mix of analog capacity and digital channels – including switched digital – is required to accommodate reasonably foreseeable consumer demand.

Market factors that will determine the appropriate video platform include consumer behavior and the service requirements of programmer-customers. To ensure that video dialtone becomes a viable competitor to existing cable company services, video dialtone providers must have the flexibility to respond to these marketplace factors.

A. Analog Channels Are Necessary to Stimulate Consumer Interest In Video Dialtone.

It is vitally important for the success of video dialtone that its first appearance in the marketplace be in a form familiar to consumers. Consumers are more familiar with existing analog services offered by cable operators than they are with emerging digital or interactive services. As a result, consumers will expect analog-based services to be on the video dialtone network, along with the emerging digital interactive services. Furthermore, to support consumer demand, the popular video programming must be widely available in a digital format. Until this happens, it would be counterproductive to mandate an all-digital video dialtone system.

Additionally, there may be a group of consumers who only want traditional analog programming. Video dialtone must be allowed to satisfy that segment of market demand. These consumers would likely reject video dialtone if local exchange companies ("LECs") were required to offer all digital networks. Market acceptance of video dialtone will be greater and will occur more quickly, if video dialtone providers have the option of providing analog services. The FCC should

facilitate consumer choice by allowing video dialtone providers to deploy services that will satisfy this component of market demand.

B. Programmer-Customers Will Want to Offer Analog Channels.

From the perspective of the programmer-customers, analog channels offer a ready entrance into the marketplace. Consumers are familiar with, and will readily purchase, services delivered over analog channels. Unlike with digital transport platforms, the programmer-customer does not need to encode and decode programming offered on analog channels. A video dialtone network without analog channels could foreclose a class of programmer-customers from the network because of limited consumer acceptance and higher production costs. Such an outcome would be inconsistent with the FCC's video dialtone objectives.

From an economic point of view, a new service such as video dialtone needs to gain a certain level of marketplace acceptance relatively quickly in order to generate the revenues that will allow it to compete effectively with the incumbent cable systems. If video dialtone is forced to enter the market with a platform that is less cost-effective for the most popular services or with new services that require significant changes in consumer behavior, video dialtone will never reach its full potential, and the FCC's three "overarching" objectives with respect to video dialtone will not be met.⁴

Marketplace factors such as consumer acceptance and business economics—not regulatory requirements—should dictate the timing of implementation of an all digital network. Accordingly, LECs must be allowed the option of entering the video services market with both analog and digital channels.

⁴ Video Dialtone Order at ¶ 1.

II. ANALOG CAPACITY ISSUES CAN BE RATIONALLY ADDRESSED ON A CASE-BY-CASE BASIS

On the basis of on its independent research and information obtained from other marketing sources, Ameritech designed its video dialtone system to accommodate the expected near-term demand for analog channels and the evolving demand for digital channels. The initial selection of 70 analog channels was based on this market reality as well as certain inherent technical limitations. The Section 214 applications filed over the last 18 months confirm that between 60 and 80 analog channels is a realistic assessment of the maximum analog capacity available for an economically efficient video dialtone network.⁵

It is only if the demand for analog channels exceeds supply that the Commission will need to implement rules to deal with that excess demand. The level of demand for commercially available video dialtone is, as of today, unknown. Consequently, it is impossible to state with any degree of certainty how many programmer-customers will want to purchase analog channels.

Should demand greater than the 70 analog channels materialize, there are meaningful ways of increasing analog channel utilization. The Commission concluded in the Reconsideration Order that analog capacity must only be expanded where technically and economically feasible.⁶ This analysis necessarily includes an assessment of whether customer programmers would be willing to pay the additional costs associated with expansion of analog capacity.

One possibility for increasing analog capacity is a "local delivery" option. This option reduces the geographic delivery of the analog signals. By precisely identifying a particular geographic area that a programmer-customers serves, the

⁵ See, e.g., Section 214 Applications of U S West Communications, Inc., File No. W-P-C 6868 and Southern New England Telephone Company, File No. W-P-C 6858.

⁶ Reconsideration Order at ¶ 38.

programmer could lease analog capacity to be delivered to less than the total service area (e.g., a LATA) thereby making additional analog capacity available for other programmer-customers.

Second, the reallocation of digital channels within a video platform to deliver analog channels is another solution to analog capacity shortages. It is possible to increase the number of analog channels by reducing the number of digital channels. A LEC should be allowed this option if a shortage of analog channels develops.

Finally, in its Reconsideration Order, the FCC tentatively concluded that channel sharing mechanisms might be permissible.⁷ The concept of channel sharing was first discussed over a year ago. This, of course, was prior to the recent FCC's clarification of the analog capacity expansion requirement. In the initial Video Dialtone Order the expansion requirement was unqualified. However, in the Reconsideration Order, the FCC clarified that analog capacity must be expanded only where "technically feasible and economically reasonable." In light of this clarification and the complexities involved in implementing channel sharing arrangements, a LEC should have the option of considering channel sharing, along with other possible solutions, if there is a need for additional analog capacity.⁸

⁷ Reconsideration Order at ¶ 274.

⁸ One important point with respect to Ameritech's common channel manager concept is often overlooked. Unlike the "will carry" proposals, the programmer-customers and end-users of the video dialtone network, in effect, decide which channels will be shared. The programmer-customers make this decision directly by deciding which channels will be shared. The end-users indirectly select the channels by their viewing choices. If a channel does not have a certain level of ratings or the programmer-customers do not elect to share common channels, there will be no shared channels. This is in contrast to the "will carry" proposals that contemplate automatic carriage of certain channels, regardless of programmer-customer interest or end-user demand.

However, if a LEC decides to pursue the channel sharing option,⁹ Ameritech believes that the proposal set forth in its ex parte is the correct way to administer channel sharing.¹⁰

While accepting that analog channels will be necessary during the initial deployment of video dialtone, it must also be recognized that digital multicast channels and digital switching are effective alternatives to increasing analog channel capacity. Digital compression will allow an average of 10 channels to be delivered using the same spectrum as a single analog channel. This transport efficiency provides significant capacity expansion and may be used by programmer-customers to offset any other higher costs associated with digital service.

In a switched network, program signals would not be placed on the local distribution network unless requested by at least one end user. The result would be that programmer-customers would have near limitless access to the video dialtone network enabling more choices to end users using the same amount of network capacity.

The FCC should allow LECs significant flexibility in resolving any capacity shortages that arise. Under rules announced in the Reconsideration Order, LECs must advise the FCC if any programmer is denied capacity and must explain in detail the steps the LEC will take to accommodate that programmer.¹¹ These reporting requirements ensure that the FCC will be closely involved in the resolution

⁹ One of the objections raised to the common channel manager concept is that it would impermissibly involve Ameritech in video programming. Ameritech notes that the U.S. District Court for the Northern District of Illinois has declared the Cable Act cross-ownership ban (Section 533 of the Communications Act), unconstitutional, as a violation of the First Amendment rights of Ameritech. See, Ameritech Corp. v. United States, Nos. 93-C-6642 and 94-C-4089 (N.D. Ill. Oct. 27, 1994) ("Ameritech First Amendment Decision"). Unless new laws or regulations are promulgated, this ruling would arguably allow Ameritech to assume the common channel manager role, if it so desired.

¹⁰ Ameritech's Ex Parte Statement to A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, dated May 9, 1994, from Anthony M. Alessi, Ameritech, Director of Federal Relations, at p. 9.

¹¹ Reconsideration Order at ¶ 38.

of any capacity problems, and suggest that the parties should be given latitude in resolving the problem, subject to FCC approval. This is preferable to establishment of concrete rules that do not reflect the numerous solutions that might be available in any particular instance.

III. THE CABLE TELEVISION ACQUISITION BAN SHOULD BE MODIFIED TO PERMIT THE ACQUISITION OF CABLE FACILITIES IN CERTAIN MARKETS

In the Reconsideration Order, the Commission generally affirmed its prohibition on the acquisition of cable television facilities for use in providing video dialtone.¹² At the same time, the Commission noted that there may be some markets that cannot support two video delivery wires, and that relaxing the acquisition ban might be appropriate in some instances. Recognizing the need to address this situation, the Commission sought comment on what criteria might be used to relax the prohibition on a case-by-case basis.

There will undoubtedly be markets with economics that do not support "overbuilding" an incumbent cable provider with a video dialtone network. In these markets, the rate at which new services are deployed could be increased if LECs were allowed to acquire existing cable facilities to extend the reach of video dialtone networks.

Although it would be difficult, if not impossible, to develop meaningful rules to govern every situation, there are valuable criteria that can help identify areas warranting consideration. The two most useful criteria involve: a) density - the number of homes per plant mile and b) composition - the percentage of the distribution network facilities that are aerial versus buried. A combination low density and low percentage of aerial describes markets with the least desirable cost characteristics. In these situations, an analysis based on revenue potential is not

¹² *Id.* ¶ 48.

appropriate since the "per subscriber" cost to serve these markets with an overbuild video dialtone network is probably too high relative to typical revenue expectations. The "per subscriber" cost will vary with the penetration rates and, of course, the lower the penetration rate, the higher the cost "per subscriber" and the longer the payback period will be.

Because of these many variables, the FCC is correct in not attempting to define precisely the markets where acquisitions would be allowed. A case-by-case analysis taking into account the specific facts relevant to each market would best reflect economic realities.¹³

IV. THE COMMISSION SHOULD NOT MANDATE PREFERENTIAL ACCESS

The Commission also seeks comment on whether it legally can and, if so, should mandate preferential treatment for certain types of programmers, including broadcasters, public, educational, or government ("PEG") channels, or non-profit organizations.¹⁴

It would be difficult to reconcile such mandated preferential treatment with the common carriage obligation imposed by the Commission's video dialtone regulatory structure. Making an exception for this category of programmers could undermine the Commission's common carriage policy with respect to other aspects of the video dialtone platform, including, for example, the number of channels allocated to a single programmer-customer and rejection of the "anchor programmer" concept.

¹³ In the absence of new regulations based on a provision other than §533(b) of the Cable Act, which has been declared unconstitutional (See, Ameritech First Amendment Decision), LECs would appear to have the option of purchasing cable facilities in their service areas.

¹⁴ Reconsideration Order at ¶ 281.

Moreover, there are alternatives to mandated preferential treatment. For example, at Level 2 of the video dialtone platform, a gateway operator or programming aggregator could offer “time-slot” pricing, or similar arrangements, that would allow lower cost access to subscribers.

Another approach – reflected in the illustrative tariff provided with Ameritech’s Section 214 applications – provides for local delivery channels that effectively provide cost-efficient access by allowing a programmer-customer access to a subset of the area-wide sites passed, with correspondingly lower total charges.

In summary, preferential access is inconsistent with the common carrier framework of video dialtone. Furthermore, preferential access can be accomplished through means other than additional regulation.

V. ADDITIONAL REGULATIONS CONCERNING POLE ATTACHMENTS AND CONDUIT ARE UNNECESSARY

The FCC has asked for comments on whether the channel service rules on pole attachments and conduit should be applied to video dialtone.¹⁵ Those rules provide that a LEC seeking approval to offer channel service must show that the cable provider for whom they are furnishing channel service has reasonable access to poles and conduit.¹⁶ Notwithstanding the cable TV operators’ allegations concerning historical pole attachment practices, the fact is that cable TV access to poles and conduit has generally not been a significant problem in recent years. Irrefutable proof of this fact is that cable service is available to over 90% of the country.

Moreover, the Pole Attachment Act specifically empowers the Commission to “regulate the rates, terms, and conditions for pole attachments to provide that such

¹⁵ Reconsideration Order at ¶ 285.

¹⁶ *Id.*

rates, terms and conditions are just and reasonable"¹⁷ Indeed, cable operators have not hesitated to avail themselves of their remedies under the Pole Attachment Act. There is a well-established complaint process for pole attachment and conduit access issues. Therefore, the cable interests cannot reasonably argue that they have been denied, or will be denied, access to pole attachments or conduit space. In light of existing legal and regulatory rules, there is no possibility that their access could be denied or burdened by unreasonable terms and conditions.

VI. CONCLUSION

The FCC has an adequate record to make decisions on these issues. Prompt action by the FCC – should do so focusing on its objectives of offering consumers greater choice and introducing competition into the video marketplace – would bring substantial benefits to the American public.

Respectfully submitted,


Larry A. Peck

Michael S. Pabian
Pamela J. Andrews
Attorneys for Ameritech
Room 4H74
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
(708) 248-6082

Dated: December 16, 1994

¹⁷ 47 U.S.C. §224(b)(i).